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United States District Court

SOUTHERN DISTRICT OF NEW YORK

Criminal No. C. 128-402

UNITED STATES OF AMERICA

against

ALGER HISS,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL UNDER RULE 33 ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

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of Counsel.

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL UNDER RULE 33 ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

Defendant's motion for a new trial on the ground of newly discovered evidence, under Rule 33 of the Federal Rules of Criminal Procedure, was made on January 24, 1952, by filing the motion, with proof of service, in the office of the Clerk of the Court. With the motion were filed a number of supporting affidavits and exhibits, and a notice that the motion would be brought on for hearing on February 4, 1952, which was the next regularly available day for the hearing of criminal motions.

Pending adjournments of the hearing at the request of the Government, a supplemental set of affidavits in support of the motion was filed on March 12, 1952. While these affidavits added to the proof offered, they noted that the Government still declined to allow the defense to inspect the original evidence on which the conviction had been centrally based—the so-called Baltimore Documents which had been Chambers's only proof of his alleged espionage conspiracy with Hiss. At a conference in chambers at which the Government asked a further adjournment of the hearing the United States Attorney at last withdrew his objection to inspection of the original documents, and during the first part of April experts retained by the defense were permitted to examine them and to take samples of blank portions of the various pieces of paper involved. A second set of supplemental supporting affidavits, based on this study, was filed on April 21, 1952, the date agreed on by counsel and fixed by the Court as giving the defense sufficient time to examine the documents and formulate conclusions thereon.

Affidavits on behalf of the Government, purporting to answer all three sets of affidavits filed in support of the motion, were filed on May 19, 1952.

Judge Goddard requested that memoranda of law be exchanged by the parties and filed within one week after the due date of the Government's answering affidavits, that is, by May 26, 1952. This memorandum, prepared in response to that request, undertakes to do four things:

1. To dispose of what the United States Attorney calls (MJL Aff., p. 3)[1] "a serious question as to whether this court has jurisdiction to entertain this motion"—the United States Attorney's doubt being based on a claim that the motion was not made in time.

2. To outline the standards of decision applicable in passing upon a motion of this nature in the federal courts.

3. To summarize the evidence offered by the defendant on this motion, and demonstrate its destructive effect on the case as made by the Government at the trial.

4. To clear away some of the mists of confusion with which the Government's answering affidavits obscure the issues.

I

Timeliness of the Motion

The motion is made under Rule 33 of the Federal Rules of Criminal Procedure. The Rule provides as follows:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on

[1] Since the leading affidavits on this motion are made by opposing counsel sharing a common surname, they will for convenience be referred to as follows: Original moving affidavit 1/24/52, "CTL Aff. I"; first supplemental affidavit 3/12/52, "CTL Aff. II"; second supplemental affidavit 4/21/52, "CTL Aff. III"; Government's affidavit in opposition, "MJL Aff."

> remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

The motion is thus required to be "made * * * within two years after final judgment." The language, of course, poses two questions: (1) When is a motion of this character "made"? (2) What event—judgment of conviction in the district court or final disposition of the case in the course of the appellate process—constitutes "final judgment"?

In this case the Court's Judgment and Commitment was made and filed on January 25, 1950. The conviction was affirmed by the Court of Appeals for the Second Circuit on December 7, 1950, and a petition for rehearing was denied on January 3, 1951. A petition for certiorari was denied by the Supreme Court on March 12, 1951, and the mandate of the Court of Appeals was filed in this Court on March 16, 1951.

It follows that if "final judgment" is interpreted as referring to the mandate of affirmance by the Court of Appeals, the motion would be timely if made on or before March 16, 1953. If on the other hand "final judgment" refers to the date of the Judgment and Commitment of this Court, the motion was required to be made on or before January 25, 1952.

The question whether the earlier or the later date is the correct one was raised and left open in this Circuit in *Oddo* v. *United States,* 171 F. 2d 854 (C. A. 2d, 1949), cert. denied 337 U. S. 943. However, *Harrison* v. *United States,* 191 F. 2d 874 (C. A. 5th, 1951) is plain authority that the later date—the date of issuance of the mandate of affirmance—is the governing date.

> * * * Under Rule 33, the motion on the ground of newly discovered evidence may be made within two years "after final judgment"; on any other grounds the motion must be made within 5 days "after verdict or finding of guilty". The quoted terms were used also in the earlier rule. We think the distinction between the two quoted phrases is significant and that "final judgment" includes in the present case the mandate of affirmance from this court. (p. 875) [2]

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[2] The *Harrison* case, it is true, did not involve the question whether the two years had expired, but rather whether after mandate of affirmance the district

We think it clear, therefore, that the pending motion would have been in time if filed at any time on or before March 16, 1953.

Even were the law otherwise, however, there is no question but that the motion was made in time. For it was served and filed on January 24, 1952, within two years after the final judgment of the District Court.

The United States Attorney appears to suggest (MJL Aff., p. 3) that the motion was not "made" on January 24th within the meaning of the rule for the reason that the original return day stated in the notice of motion was February 4, 1952.

We respectfully submit that there is no basis for the United States Attorney's suggestion.

1. February 4, 1952, was not, as the United States Attorney says (MJL Aff., p. 3), given in the motion as the "day the defendant would make his application to the court". The application was made in the motion itself, dated, served, and filed, on January 24th, in conformity with Form 23 of the Forms annexed to the Federal Rules of Criminal Procedure:

> Alger Hiss, the defendant herein, pursuant to Rule 33 of the Federal Rules of Criminal Procedure moves the Court for an order granting a new trial on the ground of newly discovered evidence, and for such other and further relief as the Court may deem just and proper.

Dated: January 24, 1952.

Beer, Richards, Lane & Haller,
By: Chester T. Lane
A member of said firm,
Attorneys for Defendant,
70 Pine Street,
New York 5, New York.

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court had any jurisdiction to entertain a motion for a new trial without prior leave of the court of appeals. Prior to the Criminal Appeals Rules of 1933 the district courts had no such jurisdiction. See *In re Potts,* 166 U. S. 263 (1897). The *Harrison* case thus holds that Rule 33 (and its predecessor, Rule II(3)) confers upon district courts a jurisdiction to entertain motions for new trial on the ground of newly discovered evidence made after mandate of affirmance. The same conclusion was reached *sub silentio* in *Oddo* v. *Unted States, supra,* as well as in an earlier 5th Circuit case, *Fogel* v. *United States,* 167 F. 2d 763.

2. Motions under the Federal Rules of Criminal Procedure are made when filed. This should be apparent from the structure of the Rules themselves. Under Rule 33, motions for new trials on grounds other than newly discovered evdience "shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period." Under Rule 45(d) a written motion and notice of hearing must be served "not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court."[3] If a motion were regarded as being "made" only on the specified hearing date, no motion could be "made" in time under the 5-day clause of Rule 33 unless it and notice of hearing were served on the day of verdict or an extension of time were granted. The language of the Rule cannot be given so meaningless an interpretation; nor can "made" be given different meanings in the two clauses of the Rule.

3. The courts, in interpreting the Rule, use the words "made" and "filed" interchangeably. See, for example, *United States* v. *Smith,* 331 U. S. 469, 472-3:

> The first sentence of this rule [Rule 33] is declaratory of the power to grant a new trial "in the interest of justice". * * * But this sentence says nothing of the time within which the court must act or of the effect of an intervening appeal and affirmance on the power. *Such time provisions as there are relate to the filing of motions by the defendant.* [Emphasis supplied.]

Cf. *Marion* v. *United States,* 171 F. 2d 185 (C. A. 9th, 1948):

> * * * Rule 33 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., requires that the motion for new trial based on grounds other than that of newly discovered evidence shall be made within five days after verdict. * * * The filing of the motion was much too late on grounds other than newly discovered evidence and, as pointed out, that ground was not included in the motion. * * *
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> * * * * * *
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> * * * In the case of Miller v. United States, 5 Cir., 134 F. 2d 485, it was held that under Rule II of the criminal appeals rules

[3] And cf. Rule 47: "An application to the court for an order shall be by motion. A motion * * * shall be in writing unless the court permits it to be made orally * * *." The motion is the writing.

of 1933, 292 U. S. 661, that a district court was without jurisdiction to hear a motion filed after the expiration of the time limit. Rules 33 and 34 merely enlarge the time limit allowed under former Rule II (pp. 185-6).

Cf. also *Hurst* v. *United States,* 192 F. 2d 930 (C. A. 10th, 1951); *Harrison* v. *United States,* 191 F. 2d 874 (C. A. 5th, 1951).

4. A contrary holding would be intolerable. The policy of the Federal Rules of Criminal Procedure is to promote uniformity. There could be no uniformity nor definite time limits if a motion were regarded as "made" only when returnable; the time limit in each district would depend on the peculiar rules or practices of that district regarding the times for hearing criminal motions.

If there were any logical alternative to holding that the motion was "made" when filed, it would surely be not when it was initially made returnable, but when it was actually heard. But that would be even more impossible; it would render the "making" of the motion dependent upon the ability of moving counsel actually to secure a hearing on the date specified in his notice of hearing. Would the United States Attorney contend that, because of the successive adjournments of hearing given at his request or for reasons within his exclusive control, the pending motion has even now not yet been "made"?

The motion was made in time.

II

The Applicable Standards

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court,[4] and the question presented to a trial court on a particular motion of this nature can therefore seldom be determined by reference to decisions of other courts in other cases involving other factual situations. There are, however, certain broad criteria by which the courts have come to test the sufficiency of the grounds given for the motion. The

[4] *Prisament* v. *United States,* 96 F. 2d 865, 866 (C. A. 5th, 1938). The proposition is so well established that further citation of authority would be superfluous.

classic statement of these criteria is that of Judge Lumpkin in *Berry* v. *State,* 10 Ga. 511, 527 (1851):

> Upon the following points there seems to be a pretty general concurrence of authority, viz: that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz; speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced or its absence accounted for. And 6th. a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.[5]

The prevailing federal rule, stemming from the rule of *Berry* v. *State,* is stated in *Johnson* v. *United States,* 32 F. 2d 127, 130 (C. A. 8th, 1929), as follows:

> That a new trial should ordinarily be granted because of newly discovered evidence is elementary. But here again are required preliminary showings of diligence and other vital elements. There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. 12 Cyc. 734, and cases cited.

This statement of the rule has been so frequently referred to or quoted with approval in the federal courts[6] that it may be taken as

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[5] This statement of the rule is quoted with approval in *United States* v. *Johnson,* 142 F. 2d 588, 592 (C. A. 7th, 1944), and is referred to as "the frequently quoted rule" by the Supreme Court in *United States* v. *Johnson,* 328 U. S. 106, 110, n. 4.

[6] See, e.g., *Prisament* v. *United States, supra,* footnote 4; *Wagner* v. *United States,* 118 F. 2d 801 (C. A. 9th, 1941); *Brandon* v. *United States,* 190 F. 2d 175 (C. A. 9th, 1951); *Evans* v. *United States,* 122 F. 2d 461 (C. A. 10th, 1941); *Heald* v. *United States,* 175 F. 2d 878 (C. A. 10th, 1949); *Thompson* v. *United States,* 188 F. 2d 652 (D. C. Cir., 1951).

the starting point for any discussion of the showing which should be made in support of the motion. For purposes of the present case, however, it should be read in conjunction with a separate rule, of possibly more limited application but available where, as here, the thrust of the new evidence is to establish the falsity of material testimony given at the trial. This separate rule, known as the rule of the *Larrison* case, calls for the granting of a new trial where:

> (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> (b) That without it the jury *might* have reached a different conclusion. [Emphasis in original.]
>
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.[7]

We do not argue here for the applicability of either of these rules as against the other in this particular case, for our proof would, we believe, be sufficient under either. We proceed to discuss the proof.

III

The Significance of the Proffered Evidence

The core of the Government's case against Alger Hiss at the trial was the Baltimore Documents—those belatedly produced copies or summaries of State Department documents which Chambers claimed to have found unexpectedly in November 1948 in an envelope he had

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[7] *Larrison* v. *United States,* 24 F. 2d 82, 87-8 (C. A. 7th, 1928). See also *Pettine* v. *Territory of New Mexico,* 201 Fed. 489, 494 (C. A. 8th, 1912); *Gordon* v. *United States,* 178 F. 2d 896 (C. A. 6th, 1949), cert. denied 339 U. S. 935; *United States* v. *Johnson,* 149 F. 2d 31, 44 (C. A. 7th, 1945). The latter opinion expressly recognizes and comments upon the distinction between the *Larrison* rule and the rule of the *Berry* case (*supra*). The *Johnson* decision in 149 F. 2d was reversed by the Supreme Court in 327 U. S. 106 on the ground that the Court of Appeals should not have disturbed the finding of the trial judge that the disputed testimony was not in fact false; but the opinion recognized (327 U. S. at 111, n. 5) that had the disputed testimony been found to be false a question would have arisen as to the application of the *Larrison* rule as against that of the *Berry* case.

left for ten years over a disused dumb-waiter in Brooklyn. When produced in the pre-trial deposition hearing in the Baltimore libel action on November 17, 1948 (CTL Aff. I, p. 3) they gave the first color of credibility to Chambers's fantastic tale. They were followed up by delivery to agents of the House Committee on December 2, 1948, of two strips of developed microfilm consisting of photographs of State Department documents (CTL Aff. I, p. 4); these, though more dramatically effective because of their temporary residence in a pumpkin, were relatively insignificant as proving Chambers's charge that *Hiss* had collaborated with him in his plot and given him secret documents. The potentially damning evidence was the Baltimore Documents, for of them four brief notes appeared to be in Hiss's handwriting, and the rest Chambers claimed had been typed by Mrs. Hiss and given to him by her husband (R. 290, 293).[8]

The Baltimore Documents were, immediately on their production, turned over at Hiss's instructions to the Department of Justice (CTL Aff. I, p. 3). Doubtless, although the defense was never allowed to inspect the grand jury minutes (R. 88), they led to the indictment. At any rate, they *were* the Government's evidence at the trial. The charge being one of perjury, and Chambers being the sole human witness to the facts with respect to which perjury was alleged,[9] corroboration of his story was essential under the applicable rule of *Weiler* v. *United States,* 323 U. S. 606. The proffered corroboration on Count I was exclusively the Baltimore Documents and the microfilm ("pumpkin papers"); and only the former presented the apparent, and essential, link with Hiss.

At the trial the Government produced four samples of typewriting concededly done on the typewriter owned by the Hisses in the early 1930's, and the defense produced one such sample, and a carbon of another. The Government's expert, Ramos C. Feehan, testified that the four samples produced by the Government had been typed on the

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[8] Record references are to the printed transcript prepared for the appeal from the conviction.

[9] This refers, of course, only to Count I of the indictment. We will discuss Count II later, contenting ourselves here with pointing out that the trial court charged the jury that if they found Hiss guilty on Count I they should also find him guilty on Count II (R. 3275), so that the jury's verdict reflects no necessary consideration of any separate evidence under Count II.

same machine as all but one of the typed Baltimore Documents. On this issue he was not cross-examined, for experts for the defense had advised defense counsel that in their opinion this identification was correct. The issue, therefore, as both the Government and the defense saw it then, was not whether the Baltimore Documents were typed on the Hiss machine, but whether they had been typed on it when and as Chambers said, or on the other hand had been typed on it at some other time, by Chambers or some confederate, for the purpose of falsely implicating Hiss.

Of course, though the Baltimore Documents were the essential link, they did not stand alone. There was the typewriter itself—apparently. A Woodstock machine with a history suggesting that it was the original Hiss machine had after exhaustive search been found by the defense in the possession of one Ira Lockey, in Washington; it was produced by the defense as an exhibit at the trial (Defendant's Exhibit UUU); and it was assumed by the defense throughout the trial to be the original Hiss machine. Whether or not it was so assumed by the Government, it was so treated by the Government; it sat before the jury throughout the trial, a Government witness typed on it in front of the jury to show that it worked, and the jury were informed by the prosecutor (erroneously, in fact) that it had been identified by a Government expert as the machine that typed the Baltimore Documents (see CTL Aff. I, pp. 12-13). The jury were even invited to take it to the jury room with them when they retired to consider their verdict (R. 3254, 3262).

Apart from the Baltimore Documents and the typewriter, beyond doubt the next most important single feature of the Government's case was the testimony of Edith Murray, the woman produced at the end of the second trial to testify that she had worked as a maid for the Chamberses in 1934-5 and 1935-6, and had during the latter period seen the Hisses and the Chamberses on social terms with each other. Though she corroborated nothing relevant to either count of the indictment (for she gave no testimony regarding espionage (Count I) or regarding meetings after January 1, 1937 (Count II)), she was a human witness, whose testimony, if true, could buttress the case against the charge of being a product solely of Chambers's imagination and skill at deception. It did so buttress the case. According to the prosecutor himself in his summation, it was Edith Murray "that really put the lie back where it belonged" (R. 3247).

The evidence we offer on this motion strikes at these three factors: the authenticity of the Baltimore Documents; the authenticity of the typewriter; and the authenticity of the recollection of Edith Murray. Equally importantly, through the evidence of Paul Willert and Dr. Gumpert, it strikes at the essential testimony of Chambers that he was still engaged in Communist espionage through the period when the State Department documents which he charged Alger Hiss with giving him came into being. If it had been possible at the trial to produce the evidence now available on these four points [10] or even on any one of them—the whole structure of Chambers's fabrication would have been so shaken that not only "might" the jury, in the language of the *Larrison* case, "have reached a different conclusion"; within the rule of the *Berry* and *Johnson* cases (*supra*) the new evidence is, we submit, beyond doubt "so material that it would probably produce a different verdict, if the new trial were granted". In the language of the Supreme Court in *Griffin* v. *United States*, 336 U. S. 704, 709, we ask "whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance

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[10] We have also offered the Court evidence on a fifth point—the testimony of Lee Pressman before the House Committee on Un-American Activities on August 28, 1950, to the effect that he himself was a member of the "Ware Group" of Communists, to which Chambers had testified that Alger Hiss had belonged, and that Alger Hiss was not a member of the group (CTL Aff. I, pp. 26-7).

The United States Attorney argues that this evidence would be irrelevant because the prosecution "in its direct questioning of Chambers at no point introduced the subject of Lee Pressman" (MJL Aff. p. 38). The United States Attorney is precise; it was on *re-direct* examination of Chambers that the prosecutor read into the record, and had Chambers confirm to the jury, Chambers's sworn testimony before the House Committee on August 3, 1948, that "Lee Pressman was also a member of this [Ware] group as was Alger Hiss" (R. 599). It was likewise in the course of re-direct examination of Chambers that the prosecutor read to the jury the so-called "Murphy notes" (Gov. Ex. 17), including the statement: "On being assigned to this agency Ware found a group of very promising, ambitious young men with advanced social and political ideas. Among them were Lee Pressman, Alger Hiss * * *" (R. 608).

The argument for irrelevance would seem, in the circumstances, rather weak. However, Pressman's testimony is certainly of less importance than the other grounds which have been adduced for this motion, and we will present no further argument on it in this memorandum.

favorable to the defendant had the evidence been before it".[11] Surely it would be too dogmatic as to conclude.

IV

The Government's Counter-Affidavits

The blunderbuss approach of the Government's answering affidavits makes it impracticable to answer them point by point. To attempt to do so would be to bog the argument of our motion so deeply down into controversies on minor irrelevancies, confusions, and inaccuracies that neither side nor the Court would any longer be able to tell just what the issues on the motion were, and the motion might well lose simply because we had failed to make clear its import and its merits.

In analyzing the Government's affidavits, therefore, we shall try to focus on the principal features of the evidence which we offer on the motion, explaining with respect to each category what we believe to be its relevance to the case as made at the trial. As to each category we shall then take up what we understand to be the principal objections of the Government, stating them in summary form as fairly as we can and answering them, as so stated, to the best of our ability. To the extent that arguments of the United States Attorney remain unanswered, it will be because, for the purposes of this memorandum, taking issue on them would in our judgment confuse rather than clarify.

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[11] It is not clear from the opinions why the Court in the *Griffin* case adopted a test analogous to that of the *Larrison* case, as contrasted with the *Johnson* and *Berry* rule. A footnote to Mr. Justice Murphy's dissent, 336 U. S. at 724, n. 3, suggests that it may have been because the case was a capital one; but the majority opinion makes no such point. The Government's brief in the Supreme Court, to which Mr. Justice Murphy refers in the footnote cited above, states that the cases, federal and state, make no distinction on the basis of the seriousness of the crime involved, although it does suggest that the "reasonable possibility" standard should be the proper one "where the offense in question is of a serious type, and particularly in a capital case" (Brief, pp. 20-21). A factor in the case which may well have justified the distinction is the fact that the new evidence had been known to the prosecutor at the trial but not introduced by him or made available to the defense.

A. The Typewriter

Chambers claimed that the Baltimore Documents—copies or summaries of State Department documents—were given to him by Alger Hiss as part of an espionage conspiracy, and that all the typed documents—Nos. 5-47—were typed for this purpose by Mrs. Hiss (R. 290, 293). The Government expert, Ramos C. Feehan, testified at the trial that in his opinion the typed Baltimore Documents (except No. 10) were typed on the same machine as had been used for four personal communications unquestionably typed on the machine owned by the Hisses in the early 1930's. Mrs. Hiss denied that she had typed the Baltimore Documents, and Alger Hiss that he had given them to Chambers; but there was no defense testimony offered to dispute the expert opinion that the Hiss machine had been used for the purpose. The defense had no reasonable basis at that time for questioning the expert's opinion that, if two typed documents show a certain number of identical peculiarities of type impression, it must follow that the two documents were typed on the same machine.

We have offered on this motion newly discovered evidence that it is possible to fabricate a machine which will duplicate the typing of another machine so precisely that an expert will be unable to differentiate the work-product of the two machines. We have made such a machine and shown its product to the Court. Our proof that we have achieved a successful duplication has not been refuted. We have also offered evidence that the Woodstock machine in evidence is a deliberately fabricated machine, that it cannot be the machine which the Hisses had once owned, and that it can be the machine which typed the Baltimore Documents (see CTL Aff. III, Ex. 2S-II).

The Government answers:

(1) That the defense is now advancing a theory different from that upon which the case was tried before the jury (MJL Aff., pp. 10, 11-12, 19).

Reply.

The defense has newly discovered evidence, and offers it to the Court, which removes the foundation upon which expert testi-

mony given for the Government at the trial was based. Without that testimony the essential link in the chain of the Government's evidence would have been missing. Is newly discovered evidence to be excluded because it does not comport with the Government's theory of the case? If we can now show what happened—or what probably happened—are we to be precluded from doing so because we didn't know it, and couldn't practicably have known it, at the time of the trial?

(2) That the defense has failed to establish the necessary basis for its contention of forgery, in that it "has still not produced a machine to duplicate the work of Ex. UUU", and "no credible evidence has been offered to support" the conclusion that such a duplication would be possible (MJL Aff., pp. 14, 27).

Reply.

We respectfully call the attention of the Court to the fact that with our original motion papers we filed a set of documents some of which were typed on Exhibit UUU and others on our experimental machine constructed to match it. Miss Elizabeth McCarthy, a questioned document expert, expressed her opinion that the duplication had "progressed to such a degree that an expert in the field, however, highly qualified, would find it difficult if not impossible to distinguish" the two sets of samples (CTL Aff. I, Ex. I-B).

We challenged the Government to have its experts tell these two sets of samples apart. The Government has ignored the challenge. This is its right. But it is not its right to misstate the record. We have presented evidence that forgery by typewriter is possible, and how it is possible. The Government needs a better answer than to say, merely, "incredible".

The argument that experts, including the reluctant Mr. Doud (MJL Aff., pp. 12, 27), have expressed opinions that no such duplication would be possible, is equally disingenuous. It was precisely because this was the prevailing opinion—and is apparently still the opinion of many experts, including the United States Attorney—that until we were able to prove the experts wrong we were able to make so little progress towards uncovering the truth.

(3) That even if the defense had proved that creation of a duplicate machine would be possible with the necessary training, skills, tools, and time, it has not shown that Whittaker Chambers had the necessary training, skills, tools, and time, or that he left traces of having performed the operation (MJL Aff., pp. 12, 13).

Reply.

It is no more suggested that Chambers is personally qualified to build a typewriter than it is that defense counsel, who have had one built, are personally so qualified. The defense retained an expert in the construction of unique typewriters;[12] this expert, without ever seeing the original machine and working solely from samples, succeeded in constructing a typewriter capable of duplicating the work of another. That he is the first person publicly known to have done so is no reason for assuming that he is the only person who could do so or who has ever done so; rather, that he succeeded is good ground for believing that Chambers could have found someone else, possibly among his Communist or ex-Communist Party friends, capable of doing a similar job. And as for time, Mr. Tytell points out in his affidavit (CTL Aff. I, Ex. 1-A) that, given the experience involved in constructing one machine, others could be constructed in a fraction of the time involved in the creation of the first.

Concededly, we have offered no testimony of witnesses who saw Chambers or anyone else actually making the machine—if that is what the United States Attorney means by "traces". Such an operation would hardly have been carried out in public view. But Dr. Norman offers to show (CTL Aff. II, Ex. S-II-A) definitely that Exhibit UUU *is* a fabricated machine; and if it is, the finger points unavoidably to Chambers, as the only person in whose interest it could have been fabricated.

(4) That since Exhibit UUU was produced at the trial by the defense rather than the Government, and since no Government expert testified that Exhibit UUU was the machine which typed the Baltimore Documents (or was even the original Hiss machine), evidence that it

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[12] Not, as the United States Attorney implies (MJL Aff., p. 12, last line), in the construction of typewriters for forgery purposes.

is a fabricated machine "would not be likely to produce an acquittal," and indeed might be excluded as irrelevant (MJL Aff., pp. 18-19).

Reply.

True, no expert testified regarding Exhibit UUU. But the prosecutor was not so reticent. He told the jury that it was the machine that typed the Baltimore Documents—that "our man said it was" (R. 3254). The Court charged the jury that this was the Government's contention (R. 3272), as, indeed, it was.

The question on this motion is not what evidence is inconsistent with what the Government chooses to regard as its technical "case", but what would have been, or would on a new trial be, persuasive to the jury. Against this background we have described, what could have been more significant to a jury than a showing—if it could have been made—that the typewriter, coming to all appearances from the Hiss household and demonstrably producing typing practically indistinguishable from the Hiss family typing, was in fact a fabricated machine and not the genuine Hiss machine? How could a jury fail to connect the typewriter with the documents coming from Chambers's possession, and conclude that the former, if not specifically fabricated for purposes of forging the latter,[13] had at least been made for some purpose integrally related to the furtherance of Chambers's deception?

(5) That the proof offered to establish that Exhibit UUU is a fabricated machine is inadequate (MJL Aff., 20-22, 23-24, 25).

Reply.

This proof falls into two classes: (a) proof that the time of manufacture of Exhibit UUU, as indicated by the serial number on its base—#N230099—is inconsistent with the possibility of its being the original Hiss machine; and (b) proof based on expert metallurgical examination of Exhibit UUU that it is a fabricated machine. We discuss these two classes of proof separately.

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[13] "The jury were rightly instructed that the defendant's possession of the forged paper was strong evidence tending to prove that he forged it, or caused it to be forged. Roscoe's Crim. Ev. (2nd ed.) 453." *Comm.* v. *Talbot,* 2 Allen (Mass.) 161, 163.

(a) *The serial number of Exhibit UUU.* The Hiss family Woodstock was originally owned by Mr. Thomas Fansler, Mrs. Hiss's father. We have offered proof, which the United States Attorney apparently does not question, that the machine was in Mr. Fansler's possession at least as early as July 8, 1929. If it can be proved that Woodstock No. N230099—Exhibit UUU—was not manufactured until after that date, or so close to the date that it could not practicably have been shipped to Philadelphia and bought and used there by Mr. Fansler by July 8th, it must follow that it cannot be the original Fansler-Hiss machine.

The United States Attorney says (MJL Aff., p. 21) that "the defendant's own papers establish that no company records can assist us." Our papers do nothing of the kind. We have submitted production data compiled from Woodstock Company records shown to representatives of the defense by Messrs. Carlson and Schmitt, Woodstock Company officials, which establish that the machine was probably manufactured in late July or early August, 1929, that on no conceivable theory could it have been manufactured before July 3, 1929, and that to place its date even so early requires unreasonable assumptions.[14]

It is true that the data we have submitted have not been verified by the officers of the Woodstock Company. We have explained why (CTL Aff. I, pp. 14-15). It is for just such reasons that we need a hearing at which we can by compulsory process

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[14] For instance, the United States Attorney mentions that "over thirteen thousand serial numbers were skipped by the company in that one year, with no apparent pattern or reason for these omissions" (MJL Aff., p. 21). In fixing the date as no earlier than July 3rd we have made the assumption that all 13,000 numbers were skipped *before* June 30th. To the extent that any of them might have been skipped *after* that date, as is reasonably probable, the date of manufacture would have been that much later.

The United States Attorney says (MJL Aff. pp. 21-22) that "the defendant concedes the possibility that N230099 was produced in June, 1929", and cites a memorandum of computations filed with our original affidavit (CTL Aff. I, Ex. II-D, par. 6). The United States Attorney must have misread the memorandum; it makes no such concession.

secure the presence of the witnesses and documents which are necessary to establish our case.[15]

We note that the affidavit of Earl J. Connelley (MJL Aff., Ex. F) to the effect that the FBI has not sought any other machine than #N230099 since that number became known to the Bureau on May 14, 1949.[16] Nevertheless, a hearing on this motion should require the production of the typewriter sales records taken by the FBI from Mr. Carow, the Woodstock Agency manager in Philadelphia in 1929 (CTL Aff. I, Ex. II-E, pars. 9, 10). It should also call for an explanation of the inability of the defense to secure any information from Harry L. Martin, Mr. Fansler's secretary in 1929, who would not without permission of the FBI talk about the date of purchase of the Fansler Woodstock (CTL Aff. I, p. 15).

(b) *The intrinsic characteristics of Exhibit UUU.* The defense has offered to demonstrate, through the testimony of Dr. Daniel P. Norman, that Exhibit UUU shows intrinsically that it is a machine which has been tampered with and worked over, and which shows deliberately altered type faces on many of its keys. Dr. Norman, an expert in physical and chemical analysis of paper, metals and other materials,[17] has examined Exhibit UUU, and subjected it to a series of metallurgical and other tests which form the basis of his opinion. He will be prepared to demonstrate the validity of his opinion at a hearing.

The United States Attorney seeks to counter Dr. Norman by the affidavits of three Woodstock officials (MJL Aff., Exs. C, D, and E) who state certain facts regarding the methods employed

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[15] Mr. Schmitt, one of the Woodstock officers who supplied us information but declined to authenticate it, has furnished the Government with an affidavit on another aspect of the case (MJL Aff., Ex. 3). It is significant that he has not undertaken to question the accuracy of the data we have ascribed to him regarding the date of manufacture of Exhibit UUU.

[16] The first trial began on May 31, 1949. If the FBI knew of the machine by its precise serial number on May 14th, we wonder what innuendo is sought to be conveyed by the United States Attorney's statement (MJL Aff., p. 18) that the machine "was not produced by the defense until after the testimony of Feehan at the first trial".

[17] The United States Attorney seeks inferentially to disparage Dr. Norman's qualifications by repeatedly calling him a "chemist". See MJL Aff., pp. 15, 20.

in the manufacture of Woodstock typewriters and expressly, or by inference, indicate disagreement with certain of Dr. Norman's conclusions.

We cannot here engage in a debate as to the respective merits of the various technical contentions where they conflict. However, we may point out that Dr. Norman has—as presumably the United States Attorney's witnesses have not—had the advantage of examining Exhibit UUU itself, and comparing it with numerous other Woodstocks of approximately the same vintage. The issue between experts—if, indeed, the United States Attorney's witnesses can qualify in any relevant respects as metallurgical experts rather than merely as experienced production men—is of course for decision by the Court, but we respectfully submit that that decision can only be made after a hearing at which the conflicting contentions can be fully demonstrated and examined in a way not feasible within the confines of illustrative affidavits.

To the extent that the United States Attorney undertakes to supplement the opinions of his witnesses with opinions of his own, it is perhaps not inappropriate to comment on his reasoning. One example is particularly striking. At pages 23-24 of his affidavit he discusses Dr. Norman's conclusion drawn from the metal content of the solder used on the keys of Exhibit UUU. Dr. Norman found much greater nickel content in the solder on the keys of Exhibit UUU which appeared for other reasons to have been altered than he did in the solder on the balance of the keys or on the keys of other contemporary Woodstocks.[18] On the authority of the Woodstock officials whose affidavits he annexes (MJL Aff., Exs. C, D, E), the United States Attorney asserts that no nickel was intentionally mixed in Woodstock solder, and that any traces found by Dr. Norman would in fact come from the nickel plating put on the keys at the time of manufacture. On the same authority he asserts that if keys were "altered" in a normal repair job the original nickel plating would be lost and no new nickel plating would be put on. From this he concludes that Dr. Norman must be wrong in reporting that the keys with more nickel in their solder were "altered" keys.

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[18] It should be noted that Dr. Norman's opinion was not based solely on nickel content; he called attention to other, though less marked, differences in metallic constituents, which can be developed at a hearing.

Even if the United States Attorney were correct in asserting that Dr. Norman confused nickel plating with nickel constituent in the solder—and we doubt his qualifications to question Dr. Norman's technical accuracy—his argument would hold only if the alteration of the keys had been a normal repair job. But that is the very issue. Our whole contention is that there was an alteration and that it was not a normal repair job; and Dr. Norman's findings establish exactly that contention, and even more clearly so when read in the light of the affidavits of the Woodstock officials.

B. The Baltimore Documents

The United States Attorney states emphatically (MJL Aff., p. 16) that "the defense has still not produced one person, expert or not, who challenges the principal contention of the Government and will say that the Baltimore papers and the known standards were not typed on the same machine".

This statement gives a most misleading impression of the nature of the evidence offered on this motion.

It is correct only in the sense that the defense has not offered the opinion of any expert to show by the standard techniques of document examination that the same machine was not used.

Instead, the defense has offered evidence—and until the Government can meet the test posed by our original affidavits (CTL Aff. I, Exs. I-B, I-C) must be taken as having proved—that forgery can be effected so expertly with a fabricated typewriter that the standard techniques of document examination are powerless to detect it.

The defense has offered evidence that the typewriter, Exhibit UUU, is such a fabricated machine, and that it so closely resembles in its typing product the original Hiss machine that it can only have been created for forgery purposes (see CTL Aff. III, Exs. 2S-I, 2S-II).

And, having at long last [19] been permitted, in April of 1952, to submit the original Baltimore Documents to expert analysis and lim-

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[19] The United States Attorney states that the defense "previously had had a paper analysis made during the second trial" (MJL Aff., p. 22). In fact, after strenuous and successful resistance to any such analysis (see Gov. Ex. 55, R. 3383), the prosecutor finally, when the second trial was more than half over, consented to giving the defense one 3″ x 3″ square from a blank corner of one of the Baltimore Documents (R. 1921).

ited testing, the defense has offered evidence (CTL Aff. III, Exs. 2S-II, 2S-III) that every feature of Chambers's testimony regarding the origin and intervening custody of the Baltimore Documents is false, leaving no possible inference but that they are forgeries.

The statement of the United States Attorney (MJL Aff., p. 16) that the defense experts "do not conclude, and present no evidence, that they are forgeries", can only be taken in a Pickwickian sense.

The Government seeks to disparage our evidence showing the forgery of the Baltimore Documents. It answers:

(1) Any proof that Priscilla Hiss was not the typist of the Baltimore documents is irrelevant, because the Government's case in no way hinges on who the typist was (MJL Aff., p. 16).

Reply.

This statement of the United States Attorney is a misrepresentation of the record. True, Chambers testified at R. 580, on cross-examination, that he had no recollection of seeing Mrs. Hiss type the Baltimore Documents. But he also testified positively that in fact she did type them (R. 293), and he gave a vivid description of the circumstances in which it was arranged that she should type them (R. 290).

(2) That no expert "has or can so identify a typist from typing which is merely mechanical copy-work, as was the production of these papers" (MJL Aff., p. 17).

Reply.

So far as this statement represents the personal opinion of the United States Attorney, it is of a piece with the sworn statement of his predecessor in charge of this case, in opposition to a defense motion for leave to examine specimens of handwriting and typing done by the Chamberses.

In an affidavit, reprinted at pp. 3391 et seq. of the Record, Mr. Murphy said:

> It can hardly be claimed that an expert could tell what individual typed a certain instrument by having a specimen

of his typing since the impressions are made by mechanical means, and how handwriting could help in a determination of who was the operator who typed a certain instrument seems more incredulous (R. 3393).

Against this background we can only stigmatize the conduct of the prosecutor at the trial as indefensible when, towards the close of his summation, he invited the jury to compare the Baltimore Documents with the Hiss standards and conclude that Priscilla Hiss typed both (R. 3258).

In fact, the conduct of the prosecutor in so addressing the jury, when no testimony had been given on the issue and the defense had no opportunity to correct the misapprehension, should itself give great weight, on this motion for a new trial, to our proffered evidence regarding the identity of the typist.

As a separate point, we note the reference, both in the United States Attorney's affidavit (MJL Aff., p. 17) and in the supporting affidavit of Mr. Cadigan (MJL Aff., Ex. B-1, p. 2), to the typing of the Baltimore Documents as "merely mechanical copy-work", and "copying documents". Some of the Baltimore Documents are copies; many others are not, but are summaries or paraphrases involving obvious application of editorial talents. If the opinion is that testimony as to the identity of the typist is impracticable only when copy-work is involved, that opinion is obviously of no application here.

(3) That in the opinion of the Government's experts the opinion of the defense's expert as to the identity of the typist is erroneous (MJL Aff., pp. 17-18).

Reply.

Here again, as with the attempted answer to Dr. Norman's conclusions with regard to the fabrication of the typewriter, we cannot here and now undertake to settle the battle between experts. This can be done only by the Court after a hearing at which the evidence can be examined and tested.

Comment may, however, appropriately be made on the United States Attorney's statement (MJL Aff., p. 17) that a count of typ-

ing errors apparently deliberately made to resemble those of an amateur typist is of no significance when it can be shown that there are also many other typing errors not having the same characteristic. The logic of this escapes us. Is the argument that the Baltimore Documents are only a little forged?

(4) That in the opinion of the Government's experts the defendant's experts are wrong in concluding that a variety of typing ribbons were used.

Reply.

Again, the issue is one for a hearing. We may, however, ask the basis for the United States Attorney's statement that "there is a serious question as to whether the methods available to him [Dr. Norman] would permit an accurate count" (MJL Aff., p. 24). The supporting affidavit of Mr. Cadigan (MJL Aff., Ex. B-1, pp. 8-9) makes no observation on the methods used by or available to Dr. Norman.

We ask also for the basis of Mr. Cadigan's statement that "considerable variation [in thread count] will be found throughout the length of a typewriter ribbon" (p. 8 of Mr. Cadigan's affidavit). If the statement is based upon Federal Specifications DDD-R-311D, to which he refers, those specifications should be produced at the hearing.

(5) That in the opinion of the Government's experts, the concluclusions drawn by the defense expert from the condition of the paper on which the Baltimore Documents were typed are unsound.

Reply.

Here, again, a hearing is needed. Defense expert Cadigan may be entirely correct in his generalization that the presence or absence of certain constituents in paper may affect the aging characteristics; but he offers no information as to whether those constituents were so distributed among the Baltimore Documents as to cause the differences in aged appearance between the two groups of papers.

Dr. Norman has stated positive opinions within his province as an expert, and based on expert study. He was not asked to, nor would it have been feasible for him to, present in his affidavit every detail of the analysis which brought him to his conclusions. At a hearing, however, we shall be prepared to meet all questions as to the nature of his analysis and its sufficiency to support his conclusions.

(6) That external evidence, in the form of paint splashes, demonstrates that the envelope was probably, at least at some time, over the dumb-waiter in Brooklyn (MJL Aff., Exs. B-1, B-2).

Reply.

The defense has not advanced any contention as to where the envelope alleged to have contained the Baltimore Documents may have spent its life. Our proof is directed to showing that the Baltimore Documents were not all kept in that envelope as, and for the period, Chambers said they were.

It is significant that the Government nowhere challenges our offered proof that from intrinsic evidence in the envelope itself, the Baltimore Documents cannot have been kept there with the other objects Chambers says he kept in it.

C. Edith Murray

Edith Murray testified that she worked for the Chamberses (under their false name of Cantwell) in 1934-5 at 903 St. Paul Street, Baltimore, Md., and in 1935-6 at 1617 Eutaw Place, Baltimore, Md., and that in the latter period she saw Priscilla Hiss four times and Alger Hiss once as visitors in the "Cantwell" household.

Her memory was obviously "refreshed" before she was permitted to testify, and she was strategically placed as a witness in such a way as to prevent defense counsel from testing her credibility at the trial (see CTL Aff. I, pp. 20-21).

We have offered on this motion affidavits of two witnesses, showing familiarity with the houses at which Edith Murray claims to have worked for the "Cantwells" at those times, and swearing that no Negro maid was employed at those times and places.

Does the Government produce other witnesses to establish that Edith Murray did in fact work when and where she said she did?

No. It does not. It could presumably find none.

Instead, it answers:

(1) That the defense was put on notice early in the proceedings that the Government would contend that the Chamberses had had a maid and that the maid had seen Mrs. Hiss, so that the defense should have been prepared to introduce "impeaching" evidence at the trial (MJL Aff., p. 28).

Reply.

The answer begs the question. It assumes that Edith Murray did work for the Chamberses and did see the Hisses—the very facts which the defense's witnesses propose to deny. It amounts to suggesting that the defense should have prepared to disprove Edith Murray's story before being informed Edith Murray was the person whose story was going to be told. Moreover, the charge of lack of diligence comes with peculiarly poor grace from a Government which had the witness in court at the beginning of the trial but withheld her to a point of time which made effective cross-examination, or even a request for adjournment, impracticable.

(2) That the evidence offered is "at best * * * only attempted impeachment" (MJL Aff., p. 28).

Reply.

Here the United States Attorney doubtless refers to the requirement of the *Johnson* case (supra, p. 7) that the newly discovered evidence "must not be merely cumulative or impeaching."

The United States Attorney would apparently construe the word "impeaching" as covering any disproof of a fact previously testified to by another witness.

The meaning of the requirement is more clearly revealed in Judge Lumpkin's language in *Berry* v. *State* (*supra,* p. 7), which would preclude a new trial "if the only object of the testimony is to impeach the character or credit of a witness."

The testimony of the defense's witnesses, if accepted, may serve incidentally to "impeach the character or credit" of Edith Murray, but that is far from its object. Its object is to establish that a purported fact important to the Government's case was not a fact.

To draw an analogy: if a witness testified that he saw a crime committed, would the rule regarding "impeaching" testimony preclude the defense from showing by later discovered evidence that the witness had been in the safe custody of the law a hundred miles away at the time?

(3) That the defendant's proposed witnesses may well have been wrong in their recollections, or may have had inadequate opportunities to form correct recollections (MJL Aff., pp. 29-30, 32-33).

Reply.

For all we can know with certainty, our witnesses may be wrong in their recollections. But mere speculation by the United States Attorney is no substitute for a hearing at which an opportunity may be afforded for testing the accuracy of the witnesses' recollections. This is particularly so when the United States Attorney's speculations are based, at least in part, on misrepresentation of the record,[20] and vague references to "innumerable residents" and "independent and reliable witnesses" who have given information to the Government, but who are not identified and whose affidavits are not offered. The defense's proposed witnesses

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[20] For instance, it is said (MJL Aff., p. 30) that Edith Murray "served on occasion as a maid for the Chambers at the Eutaw Place apartment", thus implying an irregularity of employment which would have made it unlikely that she would be observed. In fact, Edith Murray testified that the Chamberses came to Eutaw Place "in the fall" and "left in the spring", and that, except for days off, she worked there "all that time" (R. 3024), and "continuously" (R. 3030), her hours being "from 9, 9:30, to maybe 6:30, a quarter to 7 to 7" (R. 3024).

Similarly, it is pointed out (MJL Aff., p. 32) that at Eutaw Place there was a "readily available rear entrance" which Edith Murray could have used "despite Mr. Leisman's statement to the contrary." But Leisman's affidavit specifically mentions such a rear entrance as physically existing, although practically unavailable because it would have required a negro maid's getting permission of a white tenant to go through the basement apartment—a situation inconsistent with Baltimore *mores*.

are hardly to be sworn down by a United States Attorney who says merely that he—or someone else in the Government—has heard from some unidentified source information to the contrary.

(4) That one of the defense's proposed witnesses, Louis J. Leisman, has a shady past, and, possibly with the connivance of the defense, attempted to conceal his whereabouts from the Government (MJL Aff., pp. 31-32).

Reply.

The initial moving affidavit (CTL Aff. I, p. 21) specifically stated the address furnished to the defense by Mr. Leisman, 206 E. Read Street, Baltimore, Maryland. Furthermore, at the request of Mr. Leisman, defense counsel arranged for him to confer at the United States Court House in New York with the United States Attorney in person on March 31, 1952. In view of these facts, the implication in the United States Attorney's affidavit, that defense counsel sought to conceal Leisman from the Government, is so much at variance with the facts that we prefer to think that the error was inadvertent.

As to Leisman's past, we note that he is said to have been convicted of two crimes,[21] and acquitted of another, to have had many different addresses and many different jobs, and to have had unfortunate experiences with marriage and with alcohol.

For all we can know with certainty, these assertions may be correct. Even if they are, they do not necessarily preclude a genuine motive to help avert a miscarriage of justice in this case; in fact, the willingness of a man with such a vulnerable past to volunteer as a witness in such a case as this is in itself some proof of the *bona fides* of his testimony. But again the United States Attorney attempts to swear down the witness with unsupported assertions and innuendoes as to his character. This cannot in our courts serve as a substitute for hearing the witness.

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[21] The United States Attorney does not mention that the first of these, "unlawfully discharging a firearm" almost thirty years ago, was a misdemeanor.

D. Chambers's Break With the Communist Party

The Baltimore Documents consisted of copies or summaries of State Department documents bearing dates from January 5 to April 1, 1938 —that is, the State Department documents copied or paraphrased in the Baltimore Documents were shown to have been received in the State Department between those dates, inclusively. To have been in a position to have received the typed copies or summaries from Alger Hiss in the manner described in his testimony, Chambers would have had to be still engaged in his Communist espionage operation at least until the last of the State Department documents could have been distributed within the Department, taken home by Alger Hiss, copied by Mrs. Hiss, and handed over to Chambers. This could have been no earlier than April 4, 1938.[22]

At the trial, contradicting his prior testimony given before he had produced the Baltimore Documents, Chambers fixed the date of his break with the Party as April 15, 1938. Chambers marked the date very specifically by reference to a book ("Dunant—The Founder of the Red Cross") which he got the Oxford University Press to give him for translation. He was positive that he got the translation after his break with the Party (See CTL Aff. I, p. 22).

We have offered on this motion documentary evidence and the affidavits of two witnesses, to show that Chambers got the translation and went into hiding from the Communist Party at least some weeks before the end of March, 1938, and that therefore he cannot have been still engaged in his alleged conspiracy with Alger Hiss for the period which would be essential if his story is to hold water.

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[22] We demonstrated this point in our original affidavits (CTL Aff. I, pp. 23, 24) by reference to Government's State Exhibit 46(4), received in the Department at 7:45 P. M. on Friday, April 1, 1938. The United States Attorney says (MJL Aff., p. 7): "One of the many, many copies of State Department documents produced by Chambers bears the date April 1, 1938", and implies that there is something unfair in our having picked that one to prove our point. In fact, that is not the only one dated April 1; Government's State Exhibit 47(5) also bears that date. And our proof that Chambers left the Party at least before March 18, 1938, shows that Chambers was lying not only as to those two but as to all the others dated in the latter part of March. If he is shown to have forged the later Baltimore Documents, who will believe that any of the rest were genuine?

The Government answers:

(1) That the proffered proof shows no more than "that Chambers erred as to its [the break with the Party] happening at the time he received the translation" (MJL Aff., p. 35).

Reply.

The proffered proof shows much more than that. The affidavit of Paul Willert, Vice President of the Oxford University Press in New York, who gave Chambers the translation, shows not only that Chambers got the translation a considerable time before March 18, 1938, but also that Chambers was, well before that date, in hiding from the GPU and in fear of his life. The Government concedes, as it now must in spite of its star witness's story at the trial, that Chambers got his translation well before he said he did. Our proof shows that when he got it he had already left the Party, and could not have been still getting from Alger Hiss the Baltimore Documents he said he did. Moreover, Chambers's testimony is far too specific to be lamely passed off as an error in an "offhand statement" (Cf. R. 264).

(2) That Paul Willert, by the fact of testifying among other things to Chambers's demeanor and state of mind shown at conferences between them, demonstrates that he "is of no value as a reporter of facts", and that the United States Attorney will therefore "go no further in examining his judgment" (MJL Aff., p. 35).

Reply.

The United States Attorney here, as not infrequently in his affidavit, tries to shrug off, without answer, facts which he finds unpleasant.

(3) That, by rent receipts, utility records, and the like, it can be established that Chambers did not leave Mt. Royal Terrace until April 14, 1938 (MJL Aff., pp. 37, 38).

Reply.

The defense has not concerned itself with when Chambers left Mt. Royal Terrace, or with where he was, physically, at any time

in March or April of 1938. The issue is when he stopped acting as an emissary of the Communist Party. That is shown by the affidavits of Paul Willert and Dr. Gumpert, with the publishing house correspondence serving to fix the dates of the occurrences which they recollect independently, and which show up Chambers's falsehoods. With Chambers out of the Party at least by early March his attempted implication of Hiss falls, regardless of where Chambers may have been hiding, or not hiding, thereafter.[23]

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[23] It nevertheless seems appropriate to call attention to some of the peculiar factual confusions in which the United States Attorney is necessarily enmeshed when he tries to follow Chambers's tortuous movements:

For instance:—The United States Attorney says that "the pattern of Chambers in Mount Royal Terrace until mid-April and arrival in Florida on or immediately before May 1, 1938, is clearly depicted by the defendant's own exhibits" (MJL Aff., p. 37).

Is it clearly depicted by Chambers's letter of May 3, 1938, to Paul Willert (CTL Aff. I, Ex. IV-B-16) saying: "I have not been at Mt. Royal Terrace for more than a month"?

The United States Attorney submits (Exs. L, M) letters (which, he says, the defense "apparently did not see fit to present * * * to this court) written by Mrs. Chambers to the Headmaster of Park School under dates of April 2 and 9, 1938, respectively, and relies on them to "place her and her family in the Mount Royal Terrace home until after April 1st, 1938" (MJL Aff. p. 37).

Did the United States Attorney note that the first letter, dated Mt. Royal Terrace, April 2, was written for enclosure in the second, dated from Lynbrook, Long Island, April 9, and referred to in the latter as "an attempt to help out on the parents angle for the new catalog"? Naturally, a testimonial would be dated as from the parents' record address, regardless of where they might be when it was written.

CONCLUSION

What our evidence sums up to is that Chambers's case against Hiss is a fraud. We believe we are entitled to an opportunity to demonstrate before the Court, by expert and other witnesses, those aspects of the fraud which we have so far been able to discover.[24]

We do not yet know—and so cannot yet prove—all the *minutiae* of Chambers's fraudulent scheme. Under the law as we understand it, no such complete showing is needed to secure a new trial. We must show, if we are held to meet the standards of the *Johnson* case (*supra*, p. 7), that our evidence on a new trial "would probably produce an acquittal"; but to meet this test we do not have to diagram every detail of Chambers's machinations nor demonstrate the innocence of the defendant beyond peradventure. Under instructions which would be given by the court on a new trial a jury would have to acquit if the evidence presented raised in their minds a reasonable doubt as to the defendant's guilt (see *Coates* v. *United States*, 174 F. 2d 959, 960 (C. A. D. C., 1949)). We do not see how our evidence could do less than raise such a reasonable doubt, and therefore produce an acquittal.[25]

The United States Attorney complains, *passim* in his affidavit, that we are following a new "theory". The trial went off on the testimony

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[24] As we understand the procedure on such motions as this, the Court, unless convinced on affidavits and opening argument that the motion should be granted without more, will afford the parties an opportunity to produce the witnesses themselves, so that they may support their affidavits by testimony in open court, subject to appropriate cross-examination. The practice of permitting such direct examination of the affiants supporting the motion is illustrated in many cases; see, e.g., *United States* v. *Hefler*, 159 F. 2d 831 (C. A. 2d, 1947); *Ewing* v. *United States*, 135 F. 2d 633 (C. A. D. C., 1942); *United States* v. *Miller*, 61 F. Supp. 919 (S. D. N. Y., 1945); *Coates* v. *United States*, 174 F. 2d 959 (C. A. D. C., 1949); cf. *United States* v. *Krulewitch*, 167 F. 2d 943 (C. A. 2d, 1948). By the standards expressed in *Gordon* v. *United States*, 178 F. 2d 896 (C. A. 6th, 1949), cert. denied 339 U. S. 935, it would seem that the Court cannot properly discharge its responsibilities on this motion without affording the opportunity for such examination.

[25] Since we demonstrate the falsity of testimony of material witnesses, the rule of the *Larrison* case (*supra*, p. 8) would hold us only to the standard of showing that without that false testimony the jury might have reached a different conclusion.

of the Government's expert that the Hiss machine was used to type the Baltimore Documents. That testimony was accepted by both sides, because it was not then known among honorable people that a machine could be made so as to produce effectively forged typewritten documents. Now it is known; our proof offered to the Court shows it. In the light of our proof the testimony of the Government's expert no longer offers (if it ever did) a persuasive explanation of what might have happened. In the effort to find the truth, in which we know the Court will join, a new "theory" is essential.

The United States Attorney also complains, *passim* in his affidavit,[26] that our proof goes only to the typewritten Baltimore Documents, and that it does not touch other "corroborating" evidence offered by the Government at the trial, such as the handwritten notes (Government's Baltimore Exhibits 1-4), the testimony of Mrs. Chambers as to the meetings alleged in Count II, and (also on Count II) the "rug" and the "loan of four hundred dollars to Chambers".[27] These corroborations emanated from Chambers himself, or from Mrs. Chambers,[28] and to that extent were highly untrustworthy: even the four pencil memoranda (Baltimore 1-4) could have carried little weight of themselves, since from internal evidence they were obviously not the kind of documents which could have been prepared for espionage purposes, and might easily have been picked up from somewhere in the Department and given to Chambers by one of his acknowledged sources in the Department.[29]

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[26] But particularly at pp. 5-6.

[27] The United States Attorney might have mentioned, in the same mood, the "pumpkin papers" themselves (the microfilms produced from the pumpkin and represented in enlargements as Government's Baltimore Exhibits 48, 50-55), or the "trip to Peterborough". The latter was so effectively discredited that Chambers, in his recently published book "Witness", has to defend himself by saying at p. 431: "Obviously, if I had been lying, I would have taken care to contrive a better story, since there was no need to invent any story at all."

[28] Who testified that her dependence on her husband was such that, if he had so suggested: "We would go [tomorrow] to Ypsilanti and we would be Hogans" (R. 1063).

[29] The nature of these documents is described at some length in our brief on the appeal, pp. 27-31.

Nevertheless, the United States Attorney may well be (in the light of the affirmance of the conviction by the Court of Appeals) entirely correct in pointing out that these undisturbed "corroborations" were legally sufficient to sustain a jury verdict of guilty, and that even though we were to overthrow the first count, the second technically might stand.[30] But what we are concerned with here, under the authorities and in all common sense, is not what was legally sufficient to sustain the verdict, but what "would probably produce an acquittal"[31] if the case were again before a jury in the light of newly discovered evidence. Whatever the form of the indictment and the language of its separate counts, court, counsel, and jury all knew that Alger Hiss was being tried for engaging in an espionage conspiracy with Whittaker Chambers. A suggestion that even if the jury had concluded that Hiss never engaged in such a conspiracy, never had the typed Baltimore Documents, and never gave them to Chambers, nevertheless they might have found him guilty of having been at a party with Chambers in December 1937, or lent him $400, shows so little appreciation of the real nature of the trial, and the real influences and pressures that played upon the jury, that it ought not even to be seriously considered.

Apart from technical arguments, the United States Attorney contends that our proffered evidence, at least as it relates to the typewriter and the typed Baltimore Documents, involves factual assumptions that would be so "miraculous," "incredible," and "fantastic" (MJL Aff., pp. 10, 13) and suggests so little in the way of plausible motive on Chambers's part, as to deserve no credence.

We do not so consider our evidence. We may, and certainly do, continue to regard Chambers as far from a normal person, susceptible to motivations and capable of devices not common to the ordinary run of human beings. The record is replete with evidence to that effect, entirely apart from the psychiatric testimony at the trial.[32]

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[30] The latter proposition seems doubtful, in view of the instructions given by the Court to the jury that if they found Hiss guilty on Count I they should also find him guilty on Count II (R. 3275; see n. 9, *supra*).

[31] The *Johnson* rule, p. 7, *supra*.

[32] The United States Attorney says that "the contention that Chambers was a psychopathic personality, so desperately pursued at the second trial, appears also to have been abandoned" (MJL Aff., p. 19). He is incorrect; but for purposes of this motion we have nothing to add on that subject to what already appears in the record of the trial.

Ascribing to such a man common motives and actions would be almost a contradiction in terms.

Speculating on Chambers's possible motives, and the precise means used to give them effect, thus necessarily leads into a treacherous field. We should prefer to avoid it, having no confidence that any theory we can evolve could certainly reflect the truth. In view of the United States Attorney's challenge, however, we sketch out one possible theory which in our judgment would go far to explain Chambers's activities in the light of the available evidence. We state our theory without record references, for it depends as much on interstitial indications as on concrete evidence.

Chambesr, it is clear, left the Party in 1937 or 1938 as a man with no place in the non-subversive world. He had talents in the literary field, and got himself sporadic work as a translator. This could, however, satisfy neither his economic need for regular employment nor his desire for position and power. He was an ambitious man, and his literary talents alone were insufficient to raise him above the level of the literary herd. He had to have something additional to sell.

All he had additional was his experience in and knowledge of the workings of the Communist underground, and so he turned to this as capital. He sought to impress himself on employers of literary talent—such as Isaac Don Levine. He dramatized the importance of his secrets by meeting with Levine and Berle, and giving the latter mysterious hints of a dangerous conspiracy, spangled with names, but supported by no details and no evidence. Among the names—appearing at the end of Berle's notes of the conversation and apparently added as an after-thought—was the name of Alger Hiss.

Why was Hiss named at all, if he was no part of the conspiracy? Hiss was a man whom Chambers had known. He had stayed in Hiss's house when he desperately needed quarters, he had accepted other favors, loans of money and the like, and not repaid them. Hiss thought him a "dead-beat", and had doubtless conveyed, subtly or otherwise, the fact that he had very little use for him. What more natural, to a man of Chambers's brooding and imaginative temperament, than to cast discredit on Hiss in the places where it would hurt most, and in the form which would most readily occur to a Chambers—to suggest to Hiss's superiors in the Government a suspicion as to Hiss's loyalty?

This he did, in his conversation with Berle. It had little effect, for Hiss's known integrity of character could ride down any such denigration. So from time to time he tried again—with Raymond Murphy in 1945 and 1946, and doubtless with the FBI from time to time. We may question that even then Hiss was a prime target; Chambers was making good in the free world; his "knowledgeability" about the underground was paying dividends; and whenever he was called upon to tell his story he inserted the name Hiss again. Once he had put it in, leaving it out in subsequent versions would be too suspicious.

And so he had to include Hiss's name again on August 3, 1948, when for the first time he was called on to tell his story publicly. But the difference this time was that it was public. Hiss heard of it. Hiss challenged him to make good. He had to put up or shut up. If he let the challenge stand, his whole carefully erected structure of distinction and economic security would crumble.

Even at this time the charge was still only one of Communist infiltration—not of espionage; it was a charge not capable of proof. To defend himself Chambers had to have proof. He made the proof, and changed his story to fit it. He created the Baltimore Documents.

Would it have been so difficult? Chambers had occupied the Hiss apartment for weeks. He might well—as a literary man—have used the old typewriter for much of his own work at that time. He might have collected, with a magpie instinct, documents of one kind or another he found lying around. He might have preserved some forgotten letter written to him by the Hisses many years before. Samples of the Hisses' typing would have been easily come by. From these it would not, as we have shown, have been too difficult to construct a typewriter which would do the necessary forging. He had one made, and dramatically revealed its product in Baltimore on November 17, 1948.

Why was the fabricated typewriter found? Again, speculation only is possible, but it is reasonable speculation. Chambers could have realized that by 1938 the Hiss family typewriter would have been old; the Hisses might have given it away, or junked it; and if Chambers turned up with documents supposedly typed on it, how was he to rebut the implication that he had found it somehow and used it to type them? Would it not be better to have a typewriter that seemed to be

the original Hiss typewriter planted in some place where the Hisses or their lawyers, in the search they would inevitably make for it after the documents were produced, would be likely to find it? They did find it, and in good faith produced it at the trial. For a long time it fooled everybody into believing it *was* the original Hiss typewriter. So long as it did, the plot worked.

One further question: where could Chambers have found the State Department documents to use as a basis for the Baltimore Documents? We do not know, but surely no one nowadays can think it would have been hard. The files involved in the notorious *Amerasia* case were full of such original State Department documents. Who can doubt but that there were other similar sources available to anyone who knew his way around as Chambers did? And Chambers himself had microfilm of State Department documents—the two strips introduced in evidence, and the three other undeveloped strips also supposed to have been found in the pumpkin. How much else did he have, from which he might have had typed copies or summaries made?

We must re-emphasize that the foregoing is speculation—designed only to suggest one of the possible solutions to the web which Chambers has spun. We do not advance it as grounds for our motion.

The grounds of our motion are not speculative; they are hard facts, newly discovered. They are facts which destroy the authenticity of the typewriter, and for the fabrication of the typewriter there can be no innocent explanation. They are facts which if brought before a jury could not fail to shake it from belief in the authenticity of the typed documents offered as the principal corroboration of Chamber's story, and to create in its mind the reasonable doubt calling for acquittal.

We have been diligent to uncover these facts. Some of the circumstances of our diligence have been described in our opening affidavits as follows (CTL Aff. I, pp. 27-28):

> All the evidence hereby presented is newly discovered since the second trial, and I assure the Court that it has been gathered and presented with the greatest diligence of which I and my associates have been capable. I have referred at length under

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Point II to the disheartening difficulties with which we have been faced in our search for the history of the typewriter. Furthermore, for approximately the whole of the first year of the two year period since the judgment and sentence the energies of counsel, including myself, were unavoidably in large part devoted to the preparation of the record and brief on appeal and in certiorari proceedings in the Supreme Court. The investigation has had to be pursued in many parts of the United States and in foreign countries, and many lines of inquiry which looked and still look promising have had to be deferred temporarily, or even abandoned, because of lack of funds and personnel.

We present this motion earnestly, in the confidence that in the forum of this Court, and with the aid of its processes, we may at last be able to remove the stigma which an unjust conviction has cast on an honorable man.

Respectfully submitted,

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